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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**ILLINOIS STATE BOARD OF EDUCATION, and TED SANDERS, STATE SUPERINTENDENT OF EDUCATION,**

*Petitioners,*

v.

**BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD DISTRICT

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## QUESTIONS PRESENTED

I. Whether the Illinois General Assembly effectively nullified the duties imposed upon the Illinois State Board of Education under the federal Equal Educational Opportunities Act of 1974, 20 U.S.C. §1701 *et seq.*, by prohibiting it from withholding state funds for an educational program of a local school district which program is intentionally segregated on the basis of race?

II. Whether the Illinois State Board of Education is obligated under the Fourteenth Amendment of the United States Constitution to withhold state funds from, and avoid lending aid to, an educational program of a local school district which program is intentionally segregated on the basis of race?

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**BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, THIRD DISTRICT

## OPINIONS BELOW

The orders of the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, granting summary judgment in favor of respondent and denying the petitioners' motion for reconsideration (App. D, *infra*, 19-21), are unreported. The opinion of the Appellate Court of Illinois, Third District, affirming the Circuit Court's order (App. A, *infra*, 1-12), is reported at 502 N.E.2d 730. The Illinois Supreme Court, with one dissent, denied leave to appeal ____ N.E.2d ____. (App. C, *infra*, 15-18.) The dissent (Justice Seymour Simon) is reported at ____ N.E.2d ____. (App. C, *infra*, 15-18.)

## JURISDICTION

The opinion of the Appellate Court of Illinois, Third District, was dated December 11, 1986 (App. A, *infra*, 1-12), and a petition for rehearing was denied on January 27, 1987. (App. B, *infra*, 13-14.) The Supreme Court of Illinois denied the petition for leave to appeal on June 4, 1987. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also involves the Fourteenth Amendment to the United States Constitution which states in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Additionally, this case involves the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1701 *et seq.*, which provides in Section 1703:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this title [20 U.S.C. §§1712 *et seq.*], to remove the vestiges of a dual school system;
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the schools closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;
>
> (d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;
>
> (e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer

> is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Article 14A of the Illinois School Code (Ill. Rev. Stat. 1985, ch. 122, par. 14A-1 *et seq.*) is also involved. In particular, Section 14A-3 provides:

> Supervision of program. The administration of the [gifted children] program herein enacted, including establishing standards for personnel, shall be supervised by the State Board of Education with the advice of an Advisory Council on Education of Gifted Children. The State Board of Education shall provide that, to the extent possible with the resources available, all gifted and talented children have an opportunity to receive services and participate in appropriate programs. The State Board shall also ensure that appropriations for programs for gifted children are spent in effective and efficient ways.

Finally, this case involves Section 22-19 of the Illinois School Code, Ill. Rev. Stat. 1985, ch. 122, §22-19, which provides as follows:

> Upon the filing of a complaint with the State Board of Education, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10% of the residents, whichever is less, alleging that any pupil has been excluded from or segregated in any school on account of his or her color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his or her color, race, nationality, religion or religious affiliation or subjected

to discrimination by reason thereof, by or on behalf of the school board of such district, the State Board of Education shall promptly mail a copy of such complaint to the secretary or clerk of such school board.

The State Board of Education shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. The State Board of Education may also fix a date for a hearing whenever it has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first signatory to such complaint.

The State Board of Education may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The State Board of Education or the hearing officer appointed by it shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any circuit court of this State, upon the application of the State Board of Education or the hearing officer appointed by it, may, in its or his or her discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the State Board of Education or the hearing officer appointed by it conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before the court. The State Board of Education or the hearing officer appointed by it may cause the depositions of witnesses within the State to be taken in the manner prescribed by

law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The State Board of Education shall provide a competent reporter to record all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. A continuance may be granted provided both parties agree. The hearing officer shall report a summary of the testimony within 60 days after the hearing commences, unless a continuance is granted, to the State Board of Education who shall determine whether the allegations of the complaint are substantially correct. If a continuance is granted, the summary of testimony shall be reported to the State Board of Education within 60 days after the hearing recommences. The State Board of Education shall notify both parties of its decision within 30 days after it receives a summary of the testimony from the hearing officer. If the State Board of Education determines that a violation exists, it shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

* * *

## STATEMENT

The petitioner, Illinois State Board of Education (the "State Board"), is a division within the executive branch of government of the State of Illinois created by Article X, Section 2 of the 1970 Constitution and is charged under state law, among other things, to "supervise all the public schools in the State", Ill. Rev. Stat. 1985, ch. 122, §2-3.3, and in particular, to supervise the administration of the gifted children program in question, *id.*, §14A-3. The State Board is also a "State educational agency" within the meaning of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1720(a), §3381(k) (1982).

Petitioner, Ted Sanders, is the current State Superintendent of Education.

The respondent, Board of Education of the City of Peoria, School District No. 150 ("Peoria School District"), is a "school district" within the meaning of the 1970 Constitution and the meaning of the Illinois School Code, Ill. Rev. Stat. 1985, ch. 122, §1-1 *et seq.* It is also a "local educational agency" within the meaning of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1720(a), §3381(k) (1982).

This case arises out of petitioners' denial of the Peoria School District's request for reimbursement of funds to operate its gifted children program pursuant to Article 14A of the Illinois School Code, Ill. Rev. Stat. 1985, ch. 122, par. 14A-1 *et seq.*, based upon the State Board's determination that Peoria was intentionally discriminating on the basis of race in the operation of the program. The Peoria School District filed suit against petitioners in the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, to

compel the State Board to disburse the funds. The Circuit Court granted summary judgment in the Peoria School District's favor. The Illinois Appellate Court, Third District, affirmed, rejecting petitioners' arguments, *inter alia*, that the federal Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-1758 (1982) ("EEOA" or "Act") and the Fourteenth Amendment obligated petitioners to withhold funds from the Peoria School District for the use of such a discriminatory program. Thereafter, the Illinois Supreme Court, with one dissent, denied leave to appeal.

**A. The Statutes**

In 1974, in order to ensure that all children enrolled in public schools would be entitled to equal educational opportunity without regard to race, color, sex, or national origin, Congress enacted the EEOA which prohibits the States from denying equal educational opportunity to individuals by engaging in certain discriminatory practices, or by failing to provide certain remedies, through its "educational agencies".

The EEOA defines "educational agency" to mean a "State" educational agency or a "local" educational agency. 20 U.S.C. §1720(a) (1982). It defines a "State educational agency" as "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools * * *." 20 U.S.C. §3381(k) (1982). It defines "local" educational agency to include any "public institution or agency having administrative control and direction of a public elementary or secondary school." 20 U.S.C. §3381(f) (1982).

In Article 14A of its School Code, Ill. Rev. Stat. 1985, ch. 122, par. 14A-1 *et seq.*, the State of Illinois enacted legislation "for the purpose of assisting and encouraging local school districts in the development and improvement of

an education program * * * for gifted and talented children" whose "mental development is accelerated beyond the average or who have demonstrated a specific aptitude or talent and can profit from specially planned educational services to the extent they need them." Ill. Rev. Stat. 1985, ch. 122, par. 14A-1 and 14A-2.

Section 14A-3 of the School Code requires the State Board to supervise the administration of the gifted children program and, in particular, to "provide that, to the extent possible with the resources available, all gifted and talented children have an opportunity to receive services and participate in appropriate programs."

Section 22-19 of the Illinois School Code, Ill. Rev. Stat. 1985, ch. 122, §22-19, enacted in 1961, establishes a procedure for the State Board to address certain discriminatory practices in any of the school districts. Specifically, §22-19 provides that the State Board, upon receipt of a complaint alleging certain discrimination signed by at least fifty (50) petitioners within a school district or ten percent (10%) of the residents of a school district, whichever is less, shall, or whenever it has reason to believe that such discrimination may exist in any school district may, hold a hearing. If after such a hearing the State Board determines that a violation exists, it "shall request" the Illinois Attorney General to "apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of."

**B. The Litigation**

In 1981, the State Board and State Superintendent received complaints from the parents of black students attending the public schools. These parents alleged that the Peoria School District was engaging in intentional racial discrimination in the operation of its educational programs.

As a result of these complaints, the State Board conducted an extensive investigation, spanning over several years, of the educational programs maintained by the Peoria School District. From this review, the State Board concluded that the Peoria School District had intentionally segregated on the basis of race the gifted children program which it operated pursuant to Article 14A of the School Code. By letter dated October 1, 1984, State Superintendent Donald G. Gill notified the Peoria School District that the State Board would not approve its application for "Gifted Education" funds for the 1984-85 school year as a result of the Board's determination that the Peoria School District's "Gifted Education" program had been intentionally segregated by race.

On November 7, 1984, the Peoria School District filed a one-count action for declaratory and injunctive relief concerning the State Board's withholding of state funds. (App., *infra*, 2.)

The Peoria School District then filed a motion for summary judgment alleging that the State Board lacked authority to withhold the disputed funds from the School District based on its determination that the School District had intentionally segregated its "Gifted Education" program. Petitioners opposed summary judgment on several grounds including that the State Board had a duty to withhold funds under the EEOA, the Fourteenth Amendment, and general federal civil rights statutes.

The circuit court concluded that the State Board and State Superintendent lacked authority to withhold state reimbursement funds from an intentionally segregated local school district program and granted summary judgment in the Peoria School District's favor. (App., *infra*, 19-20.) The order, dated December 20, 1985, enjoined the State Board and State Superintendent from delaying or

denying any application for reimbursement funds for the gifted children program on the basis that the Peoria School District intentionally discriminated in the selection of students for its gifted children program. The order further directed distribution of any funds withheld for school years 1984-85 and 1985-86 to the Peoria School District. On January 17, 1986, petitioners moved for reconsideration of all issues which the court denied on February 5, 1986. (App., *infra*, 21.)

Petitioners filed a notice of appeal to the Illinois appellate court on February 28, 1986. On December 8, 1986, the appellate court issued its judgment affirming the trial court.

The state appellate court rejected petitioners' contention that §14A-3 of the School Code provided the State Board with authority to withhold gifted education funds from a local school district when it determines racial segregation exists in the school district's gifted program. (App., *infra*, 7-10.) The court further held that Section 22-19 of the School Code, Ill. Rev. Stat. 1985, ch. 122, par. 22-19, "establishes a procedure by which the [State Board] can combat what it deems to be intentional racial segregation" in the gifted children program and nowhere did it authorize the State Board to withhold funds. Instead, said the court, Section 22-19 only authorizes the State Board "to request the Attorney General to file suit for appropriate relief." (App., *infra*, 10.)

The appellate court then went on to reject the State Board's claim that the EEOA imposed a duty upon it, as a "State educational agency", to prevent and correct racial segregation, and held that even if it did, such a duty could be fulfilled by following the procedure set forth in Section 22-19 (App., *infra*, 10-11):

> We do not agree that the defendants can look to federal law to support their actions. Our supreme court stated in *Aurora East* [*Public School District v. Cronin*, 92 Ill.2d 313, 442 N.E.2d 511 (1982)]:
>
> > "This court has consistently held that, inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created." 92 Ill.2d 313, 326, 66 Ill.Dec. 85, 442 N.E.2d 511.
>
> Even assuming that the EEOA did impose a duty on the defendants, that duty could have easily been fulfilled by following the procedure outlined in section 22-19 of The School Code (Ill. Rev. Stat. 1985, ch. 122, par. 22-19), as outlined above. Instead, the defendants completely ignored the express statutory provision found in section 22-19 and adopted their own arbitrary method for dealing with perceived segregation. This we cannot allow.

Finally, for the same reasons, the appellate court rejected petitioners' claim that the Fourteenth Amendment obligated the State Board to withhold the funds. (App., *infra*, 11-12.)

The appellate court denied petitioners' petition for rehearing on January 27, 1987. (App., *infra*, 13-14.) With Justice Seymour Simon dissenting, the Supreme Court denied petitioners' petition for leave to appeal on June 4, 1987. (App., *infra*, 15-18.)

In his dissent, Justice Simon first rejected the appellate court's conclusion that Section 14A-3 did not provide the State Board with authority to withhold funds from a discriminating local school district. (App., *infra*, 16-17.) He further disagreed that "the convoluted and irrelevant statutory procedure [of Section 22-19] which depends on local residents for initiation" provided the exclusive

method of combatting segregation. In so doing, Justice Simon quoted from the dissent to the Seventh Circuit's decision in *Board of Education of the City of Peoria, School District No. 150 v. Illinois State Board of Education*, 810 F.2d 707, 714 (1987) (Cudahy, J., dissenting) which found Section 22-19 "too cumbersome to provide effective oversight of local boards," citing this Court's decision in *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963):

> The appellate court also believed that the State Board's action here was inappropriate because section 22-19 of the School Code (Ill. Rev. Stat. 1985, ch. 122, par. 22-19), in its view, furnishes the exclusive method of combatting segregation. Section 22-19 provides that upon complaint by a sufficient number of district residents, the State Board may hold a hearing on whether segregation has occurred. In the event the State Board finds a violation, it can request the Attorney General to apply to the circuit court for injunctive relief. As Judge Cudahy aptly responded to the same argument:
>
> > 'The holding of such a hearing would in itself provide no remedy. While the State Attorney General may have the power to seek enforcement after the State Board holds a hearing, his office is not the agency to which state resources to underwrite substantive responsibility for education are committed. This mechanism is also too cumbersome to provide effective oversight of local boards. The United States Supreme Court in *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963), pointed out emphatically the manifest inadequacies of this statutory approach.' (*Board of Education v. Illinois State Board of Education*, (7th Cir. 1987), 810 F.2d 707, 714 (Cudahy, J., dissenting).)
>
> While section 22-19 may be relevant when the State Board is seeking injunctive relief against a local dis-

trict, in this case the State Board requires no such order to carry out its administrative duties. I see absolutely no merit in the suggestion that the State Board, although committed with discretion to refuse funding and charged with guaranteeing equal opportunity, cannot withhold funds in this situation but must instead pursue a convoluted and irrelevant statutory procedure which depends on local residents for initiation. To accept the argument is to require the State Board itself to take a part in discriminating on the basis of race.

Finally, the dissent held that the State Board's action of withholding funds was required by the EEOA:

> The State Board's action is also, in my view, required by section 1703 of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. sec. 1703 (1982), which provides in part: * * * The appellate court rejected this argument on the novel ground that a State administrative agency cannot look to Federal law to support its actions. In reaching this conclusion, the appellate court apparently overlooked article VI of the United States Constitution, which makes the 'Constitution, and the laws of the United States * * * the supreme Law of the Land.' Like the rest of us, agencies of State government must conform to the requirements of Federal law. Having done so, the State Board cannot be taken to task for its actions.
>
> I believe the circuit and appellate courts have made a substantial error, and the petition for leave to appeal should therefore have been allowed.

(App., *infra*, 16-18.)

### C. A Related Petition For Certiorari Pending In A Case Between The Same Parties

This case and petition for certiorari bears a relation to *Board of Education of the City of Peoria, School District*

*No. 150 v. Illinois State Board of Education*, 810 F.2d 707 (7th Cir. 1987), *petition for cert. filed* June 16, 1987, No. 86-2028. In that case the Seventh Circuit held, in a divided opinion, that the State Board did not have capacity under F.R.C.P. 17(b) to file suit against Peoria to enjoin it from intentionally operating the segregated Gifted Children Program in violation of the EEOA, as well as 42 U.S.C. §1981, the State Constitution, and the Fourteenth Amendment of the United States Constitution. The basis for the Seventh Circuit's majority decision was that the State Board lacked the capacity to sue under Illinois law as a result of Section 22-19. The State Board's petition for certiorari, No. 86-2028, is pending.

## REASONS FOR GRANTING THE PETITION

### I.

### THE ILLINOIS APPELLATE COURT'S DECISION EFFECTIVELY PRECLUDES THE STATE BOARD FROM FULFILLING ITS DUTY TO ENFORCE THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974 AND COMPELS THE BOARD TO ACTIVELY FUND AND AID AN INTENTIONALLY SEGREGATED EDUCATION PROGRAM OF A LOCAL SCHOOL DISTRICT IN VIOLATION OF THE FOURTEENTH AMENDMENT.

#### A. The Illinois Appellate Court's Decision Provides Another "Dangerous Precedent" To Frustrate Enforcement Of The Equal Educational Opportunities Act Of 1974.

As noted immediately above, the Seventh Circuit has held that notwithstanding its obligations under the EEOA, the State Board lacks capacity to file suit against a local school district such as the Peoria School District to enjoin the intentional operation of a segregated school pro-

gram. The Illinois Appellate Court has now also held that notwithstanding the same Act, neither may the State Board even withhold from a school district funds which are destined to be used for the operation of such a program.

Thus, the two decisions have reduced the only Statewide educational agency in Illinois, charged with the duty of supervising all public schools and in particular the gifted children's program in question, to a powerless spectator when it encounters intentional discrimination by one of the local school districts it is charged to supervise.[1] Moreover, the subject Illinois Appellate decision forces the State Board to provide funds to, and thereby actively support, an educational program operated by a local school district on the basis of intentional discrimination.

Judge Cudahy's dissent to the Seventh Circuit's decision is no less applicable here. He found that the majority decision holding that the Illinois General Assembly may incapacitate the State Board from suing to enforce the EEOA "significantly implicated the Supremacy Clause and furnished a dangerous precedent for frustrating federal anti-discrimination statutes and the Fourteenth Amendment through allocations of responsibility for civil rights enforcement among state agencies and local government bodies under state law." (810 F.2d at 713.) That same "dangerous precedent" is extended here by forcing the State Board to provide funds to, and thus actively support, a local school district for the operation of a racially discriminating school program.

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[1] The State Board has been recognized as "the only state-level watchdog for civil rights in education" in Illinois. *Board of Education of the City of Peoria v. Illinois State Board of Education*, 810 F.2d at 713 (Cudahy, J., dissenting), petition for certiorari pending (No. 86-2028).

**B. The EEOA Imposes Specific Duties Upon The State Board To Enforce The Act, Including The Withholding Of Funds, Against Local School Districts.**

The central point which escaped the Illinois Appellate Court, but not the dissent to the Illinois Supreme Court's decision to deny leave to appeal and not the dissent to the Seventh Circuit's decision, is that the EEOA imposes specific duties upon the State Board, as Illinois' "State educational agency", to enforce the Act's anti-discrimination mandate against local school districts.

There is no dispute that the State Board meets the Act's definition of "State educational agency" under 20 U.S.C. §3381(k) as "the State board of education or other agency or officer primarily responsible for the state supervision of public elementary and secondary schools . . ." The State Board is in fact charged under state law to "supervise all the public schools in the State." Ill. Rev. Stat. 1985, ch. 122, §2-3.3.

Consistent with the broad remedial purposes of the EEOA, other courts have held that "State educational agencies" such as the State Board must ensure compliance by their local school districts with the EEOA, even if not empowered to do so under state law.

A case particularly on point is *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), where the Sixth Circuit addressed the issue of whether a State educational agency could be held liable under the EEOA by tolerating and providing assistance, including funding, to a discriminatory school program. The Sixth Circuit acknowledged that the gravamen of the plaintiff school district's complaint against the State defendants, including the Michigan State Board of Education, was "not that they *directly* engaged in discriminatory assignment of

students and teachers, but that they *tolerated* and *provided assistance* to a local school district which they knew to be engaging in such practices." 577 F.2d at 1347. (Emphasis added.) In that case, the district court was of the opinion that the EEOA applied only to direct acts of discrimination, not to indirect assistance to districts violating the Act. *Id.*

In rejecting the district court's reasoning, the Sixth Circuit held that the EEOA prohibited Michigan's State Board of Education from providing funds to a discriminating local school district:

> We do not believe that the State can escape liability under the Act merely because its support for the proscribed actions was indirect. This Court has previously noted the substantial control exerted by Michigan state officials over local school operations. *Bradley v. Milliken*, 484 F.2d 215, 238-41 (6th Cir. 1973) (en banc), *rev'd on other grounds*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). In another Michigan desegregation case, we expressly ruled that state officials could be held jointly responsible with local authorities for segregated conditions in local schools, where the state officials had shown "consistent inaction in preventing increased segregation" and had consistently provided funding and other assistance to the local district. *Oliver v. Michigan State Bd. of Ed.*, 508 F.2d 178, 186-87 (6th Cir. 1974), *cert. den.*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). Although that claim arose under the fourteenth amendment, we think the principle of joint liability is applicable here as well. Congress plainly intended that the practices listed in §1703 be ended. Such a goal can only be subverted by allowing states to knowingly support the prohibited practices with impunity. This is particularly true where state assistance forms a sizable part of the local school district's budget. We seriously doubt that congress intended to allow states

> to bankroll dual school systems, while enacting a statute specifying remedies for the *elimination* of such systems. *See* 20 U.S.C. §1702(b).

577 F.2d at 1347-48 (Emphasis in original.)

The Sixth Circuit's decision that the EEOA imposed a duty upon the Michigan State Board to withhold funds is also important here because it was rendered despite the fact that the Michigan Attorney General had issued an opinion to the State Board of Education that the state agency lacked the authority to do so under Michigan law. (See Mich. Atty. Gen. Rep. 153, Op. No. 5128, June 20, 1977.) Under Michigan law, that opinion is binding upon the state agency. *Campbell v. Patterson*, 724 F.2d 41, 43 (6th Cir. 1984), *cert. denied*, 465 U.S. 1107 (1984). Thus, *Ferndale* is exactly in point.

Similarly, in *Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981), the Idaho Migrant Council brought suit against the pertinent state agencies alleging that they had failed to exercise their supervisory powers over local school districts to ensure that students receive equal educational opportunity under §1703(f) of the Act. The Ninth Circuit upheld the plaintiff's action holding that the EEOA "imposes requirements on the State Agency to ensure that plaintiffs' language deficiencies are addressed" by local districts *independent* of what state law empowered the state agency to do. *Id.* at 71.

Indeed, in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1987), the Seventh Circuit itself held that §1703(f) of the EEOA "places the obligation on *both* state and local educational agencis to provide equal educational opportunities to their students." *Id.* at 1041 (emphasis in original). In fact, the Seventh Circuit there recognized that "[s]tate agencies cannot, in the guise of

deferring to local conditions, completely delegate in practice their obligations under the EEOA; otherwise, the term 'educational agency' no longer includes those at the state level." *Id.* at 1043.

In sum, as the above holdings make clear, under the EEOA a "State educational agency" such as the State Board may not disburse funds to a local school district's program discriminating in violation of the Act, no matter whether state law authorizes such withholding or not. As the Sixth Circuit held in *Ferndale, supra,* at 1348: "We seriously doubt that congress intended to allow states to bankroll dual school systems, while enacting a statute specifying remedies for the *elimination* of such systems."

Indeed, to hold otherwise is, as Justice Simon put it in his dissent, "to require the State Board itself to take part in discriminating on the basis of race." (App., *infra,* 18.)

### C. The State Board Has The Obligation Under The Fourteenth Amendment To Withhold Funds And Avoid Lending Aid To Local School Districts Engaged In Invidious Discrimination.

Beyond the EEOA, the State Board is obligated under the Fourteenth Amendment of the United States Constitution to withhold funds from and avoid aiding a racially discriminating local school district. In short, no state agency is permitted to lend significant aid to any school district engaged in invidious discrimination. Precisely on point is *Norwood v. D.L. Harrison,* 413 U.S. 455 (1973), where this Court held that a state statutory program under which textbooks were purchased by the State and lent to students in both public and private schools without a determination whether any participating private school had racially discriminatory policies violated the Fourteenth

Amendment. In *Norwood*, the plaintiffs filed a class action on behalf of students throughout Mississippi to enjoin in part the enforcement of the State's textbook lending program. Their complaint alleged that certain of the private schools excluded students on the basis of race and that by supplying textbooks to students attending such private schools, the state officials, including the State superintendent of education, acting for the State, had provided direct state aid to racially segregated education.

In reversing the district court's decision which upheld the state textbook program, this Court stated:

> This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. (Citations omitted.) A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable education cost for students in both public and private schools is the expense of providing all necessary learning materials. *When as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." Lee v. Macon County Board of Education*, 267 F.Supp. 458, 475-476 (M.D. Ala. 1967).

413 U.S. at 463. (Emphasis added.)

This Court went on to hold that a state agency is constitutionally required to avoid "giving significant aid to institutions that practice racial or other invidious discrimination":

> [T]he constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court holding, may discriminate if they so desire. *A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.*

413 U.S. at 467. (Emphasis added.)

Indeed, the principle that state officials cannot "fund" or otherwise aid a discriminatory local school program was established by this Court long ago in *Cooper v. Aaron*, 358 U.S. 1 (1958):

> [T]he Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, *funds* or property.
>
> * * *
>
> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized the ideal. *State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdic-*

> *tion the equal protection of the laws.* The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.

358 U.S. at 6, 18. (Emphasis added.)

*See also Penick v. Columbus Board of Education*, 583 F.2d 787, 815 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979), *reh'g denied*, 444 U.S. 887 (1979), where the Sixth Circuit acknowledged the State Board of Education's affirmative duty under both state and federal law to take all actions necessary, including, but not limited to, withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools; *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 187 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), where the same Circuit found the State Board of Education and Superintendent jointly accountable for segregated conditions in the schools, "in view of their consistent inaction in preventing increased segregation or remedying existing segregation in the Kalamazoo schools and their *consistent funding* of school construction projects [and] support for operating fund requests". (Emphasis added.)

Given this Court's unequivocal mandate in *Norwood* and *Cooper* directing States to avoid funding or otherwise aiding institutions that practice racial discrimination, petitioners' refusal to provide the Peoria School District with funds for its discriminatory educational program, was not only warranted, it was constitutionally required.

**D. The "Manifestly Inadequate" Mechanism Of §22-19 Of The School Code Cannot Be Used To Fulfill The State Board's Obligations Under The EEOA And The Fourteenth Amendment.**

The Illinois appellate court held that even if the State Board was under a federal duty, the use of Section 22-19, which relegates the Board to merely requesting the Illinois Attorney General to file suit to enjoin any discrimination that the State Board finds in publicly-provided education, fulfilled that duty.

As Justice Simon correctly concluded, to rely on Section 22-19, "a convoluted and irrelevant statutory procedure", is "to require the State Board itself to take part in discriminating on the basis of race":

> While Section 22-19 may be relevant when the State Board is seeking injunctive relief against a local district, in this case the State Board requires no such order to carry out its administrative duties. I see absolutely no merit in the suggestion that the State Board, although committed with discretion to refuse funding and charged with guaranteeing equal opportunity, cannot withhold funds in this situation but must instead pursue a convoluted and irrelevant statutory procedure which depends on local residents for initiation. To accept the argument is to require the State Board itself to take a part in discriminating on the basis of race.

(App., *infra*, 17-18.)

In his dissenting opinion in *Board of Education of the City of Peoria, School District No. 150 v. Illinois State Board of Education*, 810 F.2d 707, 713 (7th Cir. 1987), Judge Cudahy also noted the "manifest inadequacies" of Section 22-19 and found it "too cumbersome to provide effective oversight of local boards."

Indeed, in *McNeese v. Board of Education*, 373 U.S. 668, 675-676 (1963), this Court itself concluded that Section 22-19 provided "such tenuous protection" that the Court would not require a litigant to exhaust administrative remedies under it before resorting to a federal court to vindicate federal rights.

In sum, the Illinois appellate court's decision raises the spectre that enforcement of the EEOA and the Fourteenth Amendment can be impeded or deterred by a state statutory scheme which this Court has already held to be inadequate to protect civil rights, and which other Judges have found to be "manifestly inadequate", "too cumbersome" and "convoluted and irrelevant."

## II.

## THE ILLINOIS APPELLATE COURT'S DECISION THAT A STATE ADMINISTRATIVE AGENCY MAY NOT LOOK TO FEDERAL LAW AND MUST RELY SOLELY ON SECTION 22-19 STANDS IN STARK VIOLATION OF THE SUPREMACY CLAUSE.

As Justice Simon's dissenting opinion to the Illinois Supreme Court's decision to deny leave to appeal noted, the Illinois Appellate Court's "novel" decision that a state administrative agency may not look to federal law to support its actions stands in stark violation of the Supremacy Clause. No state agency, of course, can avoid the Fourteenth Amendment's proscription against lending aid to any institution which practices discrimination. *Norwood v. D.L. Harrison*, 413 U.S. 455, 463 (1973); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

Aside from the Fourteenth Amendment, neither may state law impede federal law, here the EEOA. It is well-

established that under the Supremacy Clause a "state statute is void to the extent it conflicts with a federal statute * * *." *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). Simply stated, federal law preempts state law "to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible * * *, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Michigan Canners & Freezers v. Agricultural Board*, 467 U.S. 461, 469 (1984) (quoting *Hines v. Davidowitz* (1941), 312 U.S. 52, 67) (citations omitted).[2] Accordingly, "federal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest * * *.' " *Burks v. Lasker*, 441 U.S. 471, 479 (1979) (quoting *Wallis v. Pan American Petroleum Corp.* (1966), 384 U.S. 63, 68).

Furthermore, in determining whether state law conflicts with federal law, the court must look to the effect rather than the purpose of the state law. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971); *New York State Commission on Cable Television v. F.C.C.*, 669 F.2d 58, 62 (2d Cir. 1982).

The purpose which impelled Congress to enact the EEOA, clearly set out in §202 (20 U.S.C. §1701), was to eliminate discrimination in educational opportunity:

> (a) The Congress declares it to be the policy of the United States that—
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

---

[2] *See also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99 (1984); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141 (1982).

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this part (20 U.S.C. §1701 *et seq.*) to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

Therefore, contrary to the Illinois Appellate Court's decision, the State Board must fulfill its obligations under the Fourteenth Amendment and the EEOA, and Section 22-19 of the Illinois School Code may not stand as an obstacle to its fulfillment of either.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A

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502 N.E.2d 730

BOARD OF EDUCATION OF the CITY OF PEORIA, SCHOOL DISTRICT NO. 150, Plaintiff-Appellee,

v.

Ted SANDERS, State Superintendent of Education, and the Illinois State Board of Education, Defendants-Appellants.

No. 3-86-0158.

Appellate Court of Illinois, Third District.

Dec. 11, 1986.

Rehearing Denied Jan. 27, 1987.

* * *

Justice HEIPLE delivered the Opinion of the Court:

The Peoria school district, plaintiff, operates a gifted program pursuant to Article 14A of The School Code. (Ill. Rev.Stat. 1985, ch. 122, par. 14A-1 *et seq.*) In 1981, the Illinois State Board of Education (ISBE) and its Superintendent, defendants, received complaints alleging that the plaintiff was engaging in intentional racial segregation in the operation of its gifted program. As a result of these complaints, the defendants investigated the plaintiff's gifted program, and determined that the under-representation of minorities therein revealed a discriminatory policy on the part of the plaintiff. When the plaintiff made a request for reimbursement of funds to operate the program under paragraph 14A-5 of The School Code (Ill.Rev. Stat. 1985, ch. 122, par. 14A-5), the Superintendent informed the plaintiff that the funds were being withheld because the gifted program was being operated in a discriminatory manner.

The plaintiff filed suit seeking declaratory and injunctive relief as follows:

> "A. Declaring that any quota system that grants preferential treatment for admission to a public school's 'gifted program' solely on the basis of race violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.
>
> B. Declaring that [the Superintendent] and the State Board have no authority to withhold reimbursements to local school districts for the 'Gifted Program' because of racial imbalance either under the 'Rules and Regulations to Govern the Administration and Operation of Gifted Education Reimbursement Programs' or the Illinois School Code.
>
> C. Restraining and enjoining [the Superintendent] and the State Board from delaying or denying any application for gifted program reimbursements where such delay or denial is solely on the basis of failure to meet racial quotas in the gifted program enrollment.
>
> D. Granting such other and further relief as the Court may deem just."

The plaintiff subsequently moved for summary judgment. The trial court granted summary judgment and declared that the defendants "have no authority to withhold reimbursements to local school districts for the 'gifted program' because of racial imbalance either under the 'Rules and Regulations to Govern the Administration and Operation of Gifted Education Reimbursement Programs' or the Illinois School Code." The court also enjoined the defendants "from delaying or denying any application for 'gifted program' reimbursements where such delay or denial is on the basis of alleged intentional racial discrimination in the selection of students for participation in the school districts 'gifted student program.' " Finally, the trial court ordered the distribution of withheld funds for the school years 1984-85 and 1985-86 because of alleged intentional racial discrimination by the plaintiff.

The defendants argue on appeal that: (1) the action against them in the circuit court violated the doctrine of sovereign immunity; (2) the circuit court erred in failing to strike plaintiff's complaint and in granting summary judgment on a theory not pleaded in the complaint; (3) state law provides them with authority to withhold state funds from the gifted education pro ·am when they determine that a school district is not operating its gifted program for the benefit of all gifted and talented children; (4) the Equal Educational Opportunities Act of 1974 (20 U.S.C.A. §§ 1701-1758) prohibits them from providing state funds to support an educational program which they determine has been intentionally segregated by race; and (5) the fourteenth amendment and general federal civil rights statutes also prohibit them from providing state funds to support an educational program which they determine to be intentionally segregated by race. We will address each of these issues in seriatim.

Initially, we address the argument that the action against the ISBE and the Superintendent in the circuit court is barred by the doctrine of sovereign immunity. The Illinois Constitution abolished sovereign immunity by providing: "Except as the General Assembly may provide by law, sovereign immunity in this state is abolished." (Ill. Const. 1970, art. XIII, § 4.) The General Assembly then enacted the Court of Claims Act (Ill.Rev.Stat. 1985, ch. 37, par. 439.1 *et seq.*) which provides that the State may not be made a defendant or a party in any court except as set forth in the Act. (*Senn Park Nursing Center v. Miller* (1984), 104 Ill.2d 169, 187, 83 Ill.Dec. 609, 470 N.E.2d 1029.) The purpose of the doctrine is that it "protects the State from interference in its performance of the functions of government and preserves its control over state coffers." (*S.J. Groves & Sons Co. v. State* (1982), 93 Ill.2d 397, 401, 67 Ill.Dec. 92, 444 N.E.2d 131.) The supreme court has consistently held that the doctrine does not apply to actions brought in the circuit court which seek to enjoin state officials from acting in excess of their delegated authority. (*Bio Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill.2d 540, 12 Ill.Dec. 600, 370 N.E.2d 223.) Fur-

ther, an action in the circuit court will not be barred by the doctrine of sovereign immunity simply because it requests disbursement of state appropriated funds that have been withheld. (See, *Senn Park Nursing Center v. Miller* (1984), 104 Ill.2d 169, 83 Ill.Dec. 609, 470 N.E.2d 1029; *City of Springfield v. Allphin* (1978), 74 Ill.2d 117, 23 Ill. Dec. 516, 384 N.E.2d 310.) For instance, in *Senn Park*, three nursing homes sought a writ of mandamus against the Director of the Illinois Department of Public Aid directing him to reimburse them for medicaid services in accordance with the Illinois State Medicaid Plan. The supreme court held that the doctrine of sovereign immunity was inapplicable stating:

> "We believe that in this case, where the defendant officer acted in excess of his statutory authority, the rights of the plaintiffs to be free from the consequences of his action outweigh the interest of the State which is served by the sovereign immunity doctrine. * * * In this case, the State cannot justifiably claim interference with its functions when the act complaint of by plaintiff is unauthorized by statute." 104 Ill.2d 169, 188, 83 Ill.Dec. 609, 470 N.E.2d 1029.

In *City of Springfield v. Allphin* (1978), 74 Ill.2d 117, 23 Ill.Dec. 516, 384 N.E.2d 310, the Director of Revenue made an erroneous determination as to the effective date of an amendment to the Illinois Municipal Code, and withheld from the city of Springfield an amount of money greater than that permitted. Springfield filed an action against the Director for a judgment declaring his interpretation of the amendment to be incorrect and asking that reimbursement be made of the amount wrongfully withheld. The court held that the action was properly brought in the circuit court and stated:

> "Where the issue is whether a State officer has refused to disburse appropriated funds according to law, and the relief sought is an injunction directing that those funds be released in accordance with the appropriation, the action is not one against the State." 74 Ill.2d 117, 124, 23 Ill.Dec. 516, 384 N.E.2d 310.

The defendants argue that this action is barred by the doctrine of sovereign immunity for two reasons. First, because the plaintiff is seeking to control the actions of a state agency and state officer, the ISBE and the Superintendent. Secondly, because the plaintiff seeks to subject the state to liability, by requiring the ISBE to distribute the funds that were withheld from the plaintiff. We disagree and believe that the Illinois Supreme Court cases of *Senn Park* and *City of Springfield* dispel both of the defendants' arguments.

In the instant case, the plaintiff sought injunctive and declaratory relief that the defendants, by withholding appropriated funds, were acting in excess of their statutory authority. Such an action is not one against the State. (*Bio Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill.2d 540, 12 Ill.Dec. 600, 370 N.E.2d 223.) The plaintiff also sought to direct the defendants to disburse appropriated funds which were withheld. *Senn Park* and *City of Springfield* establish that the plaintiff's request was not barred by the doctrine of sovereign immunity, and thus was properly brought in the circuit court.

The ISBE and the Superintendent next assert that the circuit court erred in granting summary judgment on a legal theory not pleaded in the plaintiff's complaint. The defendants state that the only claim in plaintiff's complaint was "that the defendant, by withholding state funds, seeks to impose an illegal quota system on the plaintiff," and that nowhere in its complaint did the plaintiff allege that the ISBE or the Superintendent lacked authority to withhold funds from a program which they determined was racially segregated. Therefore, defendants argue, it was error for the trial court to grant summary judgment on the ground that "the State Superintendent and State Board have no authority to withhold reimbursements to local school districts for the 'gifted program' because of racial imbalance."

We disagree. A reading of paragraphs 10 and 11 of the complaint, and part B of the prayer for relief, sufficiently set forth the plaintiff's theory and the cause of action

upon which the trial judge issued summary judgment. Paragraph 10B states in relevant part:

> "[n]either [the Superintendent] nor the State Board has legal authority to withhold funds under state or federal law solely on the basis that the admission criteria [to the gifted program] have a 'disparate impact.' "

Paragraph 11 states in part:

> "the question presented is whether [the Superintendent] and the State Board may lawfully deny the Peoria School District's request for gifted education reimbursements because of racial imbalance."

Finally, part B of the prayer for relief asks for a declaration that the Superintendent and the ISBE "have no authority to withhold reimbursements to local school districts for the 'Gifted Program' because of racial imbalance." These readings from the complaint amply support the trial judge's ruling and therefore, the trial judge committed no error.

Additionally, the defendants maintain that if a reading of plaintiff's complaint supports the judge's ruling, the complaint was defective and should have been stricken because it violated paragraph 2-603(b) of the Code of Civil Procedure (Ill.Rev.Stat. 1985, ch. 110, par. 2-603(b)), which provides:

> § 2-603. Form of Pleadings.
>
> * * * * * *
>
> "(b) Each separate cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim, as the case may be and each count * * * shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively * * *." Ill. Rev.Stat. 1985, ch. 110, par. 2-603(b).

We disagree that the form of the plaintiff's complaint was defective. Paragraph 2-603(b) of the Code of Civil Procedure does not control this matter as the defendants al-

lege. Pleadings in equitable actions are governed by Supreme Court Rule 135(a) (Ill.Rev.Stat. 1985, ch. 110A, par. 135(a)) (*Nance v. Donk Brothers Coal & Coke Co.* (1958), 13 Ill.2d 399, 151 N.E.2d 97), which provides in pertinent part:

> "Matters within the jurisdiction of a court of equity * * * may be regarded as a single equitable cause of action and when so treated as a single cause of action shall be pleaded without being set forth in separate counts and without the use of the term count." (Ill.Rev.Stat. 1985, ch. 110A, par. 135(a).)

The plaintiff's complaint was within the jurisdiction of a court of equity, as it sought declaratory and injunctive relief. Thus, it was properly regarded and pleaded as a single cause of action, and the defendants' motion to strike was properly denied.

The defendants next assert that section 14A-3 of The School Code (Ill.Rev.Stat. 1985, ch. 122, par. 14A-3) provides them with authority to withhold gifted education funds from a local school district when they determine racial segregation exists in the district's gifted program. Paragraph 14A-3 reads:

> "Supervision of program. The administration of the [gifted] program herein enacted, including establishing standards for personnel, shall be supervised by the [ISBE] with the advice of an Advisory Council on Education of Gifted Children. The [ISBE] shall provide that, to the extent possible with the resources available, all gifted and talented children have an opportunity to receive services and participate in appropriate programs. The State Board shall also ensure that appropriations for programs for gifted children are spent in effective and efficient ways." Ill.Rev.Stat. 1985, ch. 122, par. 14A-3.

We disagree that the general supervisory power established by section 14A-3 translates to provide authority for the actions taken by the defendants in the instant case. Here, without giving notice to the Peoria school district

of its intention to withhold funds, and without providing any type of hearing on the alleged discrimination, the defendants unilaterally determined that the Peoria school district was engaging in intentional racial segregation, and withheld funds based on that unilateral determination. The defendants' authority is much more limited than they wish to admit as was made clear by our supreme court in the analogous case of *Aurora East Public School District v. Cronin* (1982), 92 Ill.2d 313, 66 Ill.Dec. 85, 442 N.E.2d 511.

*Aurora East* concerned regulations promulgated by the ISBE in an attempt to enforce the Armstrong Act (Ill. Rev.Stat. 1985, ch. 122, par. 10-21.3), which provides in pertinent part:

> "As soon as practicable, and from time to time thereafter, the [local] board shall change or revise existing [attendance centers] or create new [attendance centers] in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race or nationality." Ill.Rev.Stat. 1985, ch. 122, par. 10-21.3.

If the ISBE determined that a local school district was not in compliance with the regulations, the Superintendent notified the district of that status. The district was then afforded 90 days in which to submit a plan in an effort to achieve conformance. If the school district failed to submit, amend or implement a plan, it was considered to be in noncompliance, and it was placed on probation. If a district remained on probation for one year without effecting compliance, the ISBE placed the district on nonrecognition status. When a school district lost recognition, the ISBE could withhold all federal funding to which the district would otherwise be entitled.

The supreme court recited several reasons for determining that the ISBE did not have the extensive authority it was seeking. These included:

(1) When the legislature intended to delegate authority to the ISBE, it did so expressly and specifically, and it

did not do so with regard to the Armstrong Act. 92 Ill. 2d 313, 326-27, 66 Ill.Dec. 85, 442 N.E.2d 511.

(2) There were no standards or guidelines governing the ISBE's discretion to enforce the Armstrong Act, thus indicating that no power was intended to be given to the ISBE. 92 Ill.2d 313, 327, 66 Ill.Dec. 85, 442 N.E.2d 511.

(3) The legislature *did* establish a procedure by which the ISBE could combat segregation in section 22-19 of The School Code (Ill.Rev.Stat. 1985, ch. 122, par. 22-19), which provides in part:

> "Upon the filing of a complaint with the State Board of Education * * * alleging that any pupil has been excluded from or segregated in any school on account of his or her color, race, nationality, sex, religion or religious affiliation * * * by or on behalf of the school board of such district, the State Board of Education shall promptly mail a copy of such complaint to the secretary or clerk of such school board.
>
> The State Board of Education shall fix a date * * * for a hearing upon the allegations therein. The State Board of Education may also fix a date for a hearing whenever it has reason to believe that such discrimination may exist in any school district. * * *
>
> The State Board of Education may designate an assistant to conduct such hearing and receive testimony concerning the situation complaint of. * * * The hearing officer shall report a summary of the testimony within 60 days after the hearing commences * * * to the State Board of Education who shall determine whether the allegations of the complaint are substantially correct. * * * The State Board of Education shall notify both parties of its decision within 30 days after he receives a summary of the testimony from the hearing officer. If it determines that a violation exists, *it shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.*" (Emphasis added.) Ill.Rev. Stat. 1977, ch. 122, par. 22-19.

The reasons stated in *Aurora East* for determining that the ISBE did not have the extensive authority it sought to combat segregation under the Armstrong Act are equally applicable in rejecting the defendants' contention that section 14A-3 grants them the extensive authority they seek to combat alleged segregation within the gifted program. In section 14A-3, the legislature did not expressly and specifically delegate authority to the ISBE to withhold funds upon its determination that a particular district is engaging in intentional racial segregation. Therefore, the legislature did not intend that the ISBE have such authority. Secondly, there are no standards or guidelines within section 14A-3 governing the ISBE's discretion to determine whether a local district is engaging in discrimination. This again indicates that no such discretion was intended to be given to the ISBE. Finally, the comprehensive provision set forth in section 22-19 of The School Code establishes a procedure by which the ISBE can combat what it deems to be intentional racial segregation in the plaintiff's gifted program. Section 22-19 clearly recites the powers which the legislature intended the ISBE to have. (*Aurora East Public School District v. Cronin* (1982), 92 Ill.2d 313, 328, 66 Ill.Dec. 85, 442 N.E.2d 511.) Nowhere does the section authorize the ISBE to promulgate its own sanctions, such as withholding funds, after unilaterally determining that a local school district is engaging in intentional racial segregation. As the supreme court stated in *Aurora East*, the proper course of action for the ISBE to take if it investigates and determines discrimination exists, is to request the Attorney General to file suit for appropriate relief. "This procedures insures that the [ISBE] will not assume the role of prosecutor, judge, and enforcer of its own sanctions." 92 Ill.2d 313, 332, 66 Ill.Dec. 85, 442 N.E.2d 511.

The defendants next assert that the Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. §§ 1701-1758) imposes a duty on them, as an educational agency, to prevent and correct racial segregation in state funded education programs. Therefore, the defendants argue, the EEOA

provided them with authority to withhold funds from the plaintiff's gifted program when they determined that it was being operated in a discriminatory manner. Defendants rely on that part of the Act stating:

> "No State shall deny equal educational opportunities to an individual on account of his or her race, color, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system." 20 U.S.C. § 1703.

We do not agree that the defendants can look to federal law to support their actions. Our supreme court stated in *Aurora East*:

> "This court has consistently held that, inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it was created." 92 Ill.2d 313, 326, 66 Ill.Dec. 85, 442 N.E. 2d 511.

Even assuming that the EEOA did impose a duty on the defendants, that duty could have easily been fulfilled by following the procedure outlined in section 22-19 of The School Code (Ill.Rev.Stat. 1985, ch. 122, par. 22-19), as outlined above. Instead, the defendants completely ignored the express statutory provision found in section 22-19 and adopted their own arbitrary method for dealing with perceived segregation. This we cannot allow.

In a final attempt to circumvent the express statutory provision of section 22-19, the defendants argue that the fourteenth amendment and general federal civil rights statutes provide them with authority to withhold funds from a program which they deem to be intentionally seg-

regated by race. We reject this argument for the same reasons that we reject the argument that the EEOA provides authority for the action taken by the defendants in this matter.

It is for the reasons stated herein that we affirm the judgment of the circuit court of Peoria County.

AFFIRMED.

SCOTT, P.J. and STOUDER, J., concur.

# APPENDIX B

*(Letterhead Of)*
The Appellate Court
Third District, State Of Illinois

Be it Remembered, That, to wit: On the 27th day of January, 1987, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-86-0158

Board of Education of the City of Peoria, School District No. 150,

Appellee

vs.

Ted Sanders, State Superintendent of Education, and the Illinois State Board of Education,

Appellants

APPEAL FROM: Peoria County
Hon. C. Brett Bode
84 MR 4840

Now on this day this cause coming on for hearing upon the petition for rehearing filed by Eugene M. Daly herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/s/ JOSEPH HENNESSEY
Clerk of the Appellate Court

# APPENDIX C

SUPREME COURT OF ILLINOIS
THURSDAY, JUNE 4, 1987

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

* * *

No. 64916 — Board of Education of the City of Peoria, etc., respondent, v. Ted Sanders, etc., et al., petitioners. Leave to appeal, Appellate Court, Third District. (3-86-0158)

Petition to appeal as a matter of right or leave to appeal denied. Simon, J., dissenting. Dissent attached.

Leave to appeal docket no. 64916

Board of Education of the City of Peoria, School District No. 150, Respondent, v. Ted Sanders, Superintendent of Education, *et al.*, Petitioners.

JUSTICE SIMON, dissenting:

The Illinois State Board of Education (State Board) concluded after investigation that the board of education of the city of Peoria, school district No. 150 (Peoria), was intentionally segregating its gifted students program on the basis of race and refused Peoria's request for reimbursement under article 14A of the School Code (Ill. Rev. Stat. 1985, ch. 122, par. 14A-1 *et seq.*) (Gifted Children Act). Peoria filed suit for declaratory and injunctive relief in the circuit court of Peoria County, and the circuit court granted Peoria summary judgment. On appeal that order was affirmed. (150 Ill. App. 3d 755.) Because I believe that both Federal and State law not only justify but require the State Board's action in cutting off funding to

a local district intentionally segregating an educational program by race, I would allow the petition for leave to appeal.

The appellate court concluded that the State Board's only authority over gifted students programs was of a "general supervisory" nature (150 Ill. App. 3d 755, 762) and that this court's decision in *Aurora East Public School District v. Cronin* (1982), 92 Ill. 2d 313, established that the State Board had no right to withhold funding. As Circuit Judge Cudahy put it in his powerful and compelling dissent in a case involving the same controversy, "*Aurora East* * * * does not bear the weight placed on it." *Board of Education v. Illinois State Board of Education* (7th Cir. 1987), 810 F. 2d 707, 713 (Cudahy, J., dissenting).

In *Aurora East*, this court held that the State Board had no authority to promulgate rules for implementing the Armstrong Act, which requires local boards to take the prevention of segregation into account in creating or changing attendance centers. (Ill. Rev. Stat. 1985, ch. 122, par. 10-21.3.) The court in *Aurora East* relied primarily on the fact that the statute did not expressly or impliedly delegate any authority to the State Board, and that its general powers were insufficient to sustain the challenged rules.

The statutory authority found lacking in *Aurora East*, however, is expressly delegated to the State Board here. The Gifted Children Act commands the State Board, in carrying out its duty of supervision of the program, to "provide that, to the extent possible with the resources available, *all gifted and talented children have an opportunity* to receive services and participate in appropriate programs." (Emphasis added.) (Ill. Rev. Stat. 1985, ch. 122, par. 14A-3.) If Peoria is conducting its program in a discriminatory fashion, reimbursement would defy the specific legislative directive to the State Board to guarantee equal opportunity. The statute also makes reimbursement contingent upon submission and approval of a local

district's proposal, which must "contribute to the development of a State plan to increase the service of the public school in the field of education of gifted children." (Ill. Rev. Stat. 1985, ch. 122, par. 14A-5.) To the extent that a local district is intentionally segregating on the basis of race, the State Board could well conclude that the proposal did not contribute to the statewide development of gifted education and could therefore reject the proposal and also refuse reimbursement.

The appellate court also believed that the State Board's action here was inappropriate because section 22-19 of the School Code (Ill. Rev. Stat. 1985, ch. 122, par. 22-19), in its view, furnishes the exclusive method of combatting segregation. Section 22-19 provides that upon complaint by a sufficient number of district residents, the State Board may hold a hearing on whether segregation has occurred. In the event the State Board finds a violation, it can request the Attorney General to apply to the circuit court for injunctive relief. As Judge Cudahy aptly responded to the same argument:

> "The holding of such a hearing would in itself provide no remedy. While the State Attorney General may have the power to seek enforcement after the State Board holds a hearing, his office is not the agency to which state resources to underwrite substantive responsibility for education are committed. This mechanism is also too cumbersome to provide effective oversight of local boards. The United States Supreme Court in *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963), pointed out emphatically the manifest inadequacies of this statutory approach." (*Board of Education v. Illinois State Board of Education* (7th Cir. 1987), 810 F. 2d 707, 714 (Cudahy, J., dissenting).)

While section 22-19 may be relevant when the State Board is seeking injunctive relief against a local district, in this case the State Board requires no such order to carry out its administrative duties. I see absolutely no merit in the suggestion that the State Board, although committed with

discretion to refuse funding and charged with guaranteeing equal opportunity, cannot withhold funds in this situation but must instead pursue a convoluted and irrelevant statutory procedure which depends on local residents for initiation. To accept the argument is to require the State Board itself to take a part in discriminating on the basis of race.

The State Board's action is also, in my view, required by section 1703 of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. sec. 1703 (1982), which provides in part:

> "No State shall deny equal educational opportunities to an individual on account of his or her race, color, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools * * *."

The appellate court rejected this argument on the novel ground that a State administrative agency cannot look to Federal law to support its actions. In reaching this conclusion, the appellate court apparently overlooked article VI of the United States Constitution, which makes the "Constitution, and the Laws of the United States * * * the supreme Law of the Land." Like the rest of us, agencies of State government must conform to the requirements of Federal law. Having done so, the State Board cannot be taken to task for its actions.

I believe the circuit and appellate courts have made a substantial error, and the petition for leave to appeal should therefore have been allowed.

# APPENDIX D

[Filed December 20, 1985]

IN THE
CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT OF ILLINOIS
PEORIA COUNTY

Case No. 84 MR 4840

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Plaintiff

vs.

DONALD G. GILL, TED SANDERS and ILLINOIS STATE BOARD OF EDUCATION,

Defendants

## ORDER

Plaintiff's motion for Summary Judgment is allowed and the court declares that the State Superintendent and State Board have no authority to withhold reimbursements to local school districts for the "Gifted Program" because of racial imbalance either under the "Rules and Regulations to Govern the Administration and Operation of Gifted Education Reimbursement Programs" or the Illinois School Code.

The court hereby enjoins the State Superintendent and State Board from delaying or denying any application for "gifted program" reimbursements where such delay or

denial is on the basis of alleged intentional racial discrimination in the selection of students for participation in the school district's "gifted student program". Any funds withheld for the school years 1984/1985 and 1985/1986 because of alleged intentional racial discrimination by plaintiff, which is the admitted reason that funds were withheld, shall be distributed.

December 20, 1985

/s/ C. BRETT BODE

Judge of the Tenth Judicial Circuit

[Filed February 5, 1986]

IN THE
CIRCUIT COURT OF THE TENTH JUDICIAL
CIRCUIT OF ILLINOIS
PEORIA COUNTY

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Case No. 84 MR 4840

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BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DIST. #150

Plaintiff

vs.

TED SANDERS, et al.

Defendants

---

ORDER

Defendants' motion for Reconsideration is DENIED. The court will hear argument on Defendants' Motion for Stay of Enforcement of Judgment at 11:00 A.M., February 28, 1986. Plaintiff's counsel is directed to serve a copy of this ORDER on opposing counsel.

February 5, 1986

/s/ C. BRETT BODE

Judge of the Tenth Judicial Circuit

Supreme Court, U.S.
FILED
OCT 5 1987
JOSEPH F. SPANIOL, JR.

No. 87-396

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ILLINOIS STATE BOARD OF EDUCATION, and TED SANDERS, STATE SUPERINTENDENT OF EDUCATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Respondent.

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT THIRD DISTRICT

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## QUESTIONS PRESENTED

I. Whether the Illinois Appellate Court decision, that the Illinois State Board of Education is without authority to withhold state funds from a local school district based on the State Board's unilateral finding of racial discrimination, is inconsistent with the federal Equal Educational Opportunities Act of 1974.

II. Whether the Fourteenth Amendment to the United States Constitution authorizes the Illinois State Board of Education to withhold state funds from a local school district based on the State Board's unilateral determination that racial discrimination exists, when neither state nor federal statute authorizes the State Board's action.

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### United States Constitution

The Petitioner quotes the Supremacy Clause as a "Constitutional Provision Involved". The Supremacy Clause is not pertinent to this appeal as no conflict exists between federal and state law.

### United States Statute

This case involves section 1706 of the Equal Educational Opportunities Act, 20 U.S.C. §1706, which provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

## ADDITIONAL STATEMENT

The Illinois State Board of Education and its Superintendent (hereinafter the "ISBE") repeatedly refer in their Petition to "intentional segregation" on the part of Respondent, the Board of Education of the City of Peoria (the "Peoria District"). In fact, no judicial, administrative, or other tribunal ever has made any finding that the Peoria District operates its gifted program in a manner that is racially discriminatory, whether intentional or otherwise. The Peoria District vigorously disputes that the alleged discrimination exists.

This claim arose when the State Superintendent of Education denied the Peoria District's annual application for state funds to sustain its gifted program. The Superintendent's letter denying the application noted that minorities were

"under-represented" in the Peoria gifted program, and that neutral selection criteria with a discriminatory impact are violative of black children's rights to participate in educational programs. Aside the Superintendent's comments, the only references in the record to intentional discrimination or segregation appear in the arguments or affidavits of the ISBE's counsel.

The Peoria District sued the ISBE alleging that the ISBE had no authority to withhold funding based upon the ISBE's determination that racial discrimination existed in the admission of students to the gifted program. The trial court granted summary judgment on this point in favor of the Peoria District and the Illinois Appellate Court affirmed. The Illinois Supreme Court denied the ISBE's Petition for Leave to Appeal.

## SUMMARY OF ARGUMENT

The ISBE and the Peoria District disagree concerning the method by which students should be admitted to the Peoria District's gifted program. The ISBE asserts that the students are selected in a racially discriminatory manner. The Peoria District denies that they are so selected. No judicial or administrative tribunal has ever considered, much less determined, whether the Peoria District discriminates on the basis of race. The ISBE has nevertheless withheld funding appropriated by the Illinois legislature for the Peoria District's program. Neither the Equal Educational Opportunities Act of 1973 ("EEOA") nor the Fourteenth Amendment permits a state level educational agency to withhold funding based upon a unilateral determination of racial discrimination.

## ARGUMENT

### THE ISBE HAS NO AUTHORITY, UNDER EITHER STATE OR FEDERAL LAW, TO MAKE A UNILATERAL DETERMINATION THAT RACIAL DISCRIMINATION EXISTS AND TO WITHHOLD FUNDING ON THAT BASIS.

### INTRODUCTION

The ISBE's Petition is based upon the assumption that the Peoria District's gifted program intentionally discriminates on the basis of race. The ISBE asks this Court, as it asked all lower courts, to make this assumption. All lowers courts refused to indulge in the assumption as there has never been a determination in any tribunal that the Peoria District discriminates on the basis of race.

The ISBE claims, based upon its own investigation, and nothing more, that racial discrimination exists. The Peoria District denies that racial discrimination

exists.[1] The issue is not whether the ISBE may withhold funding from a district which improperly discriminates. The issue is whether the ISBE may withhold funding from a district where there is a dispute as to whether the district discriminates and where there has been no determination in any tribunal that discrimination exists.

The Peoria District's Complaint alleged that the admission criteria to its gifted program were "racially neutral and academically specific". The Peoria District alleged that the ISBE refused funding because of the ISBE's own determination that the gifted program improperly discriminated. Former State School

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[1] In its complaint, the Peoria District alleged that it followed ISBE regulations governing the admission of students to the gifted program. R.C. 1 et seq.

Superintendent, Donald Gill, in his letter of October 1, 1984 to the Peoria Superintendent, Harry Whitaker, explained that funds were being withheld from the Peoria District even though the standards used for admission employed "apparently neutral selection criteria..." Mr. Gill stated:

> "It has been the position of the State Board of Education that programs which employ apparently neutral selection criteria but whose impact is discriminatory are violative of the rights of black children to participate in all of the School District's educational programs. Disparate impact is a legitimate test to determine if the policies of a Board of Education are discriminatory." R.C. 31.

The ISBE and the Peoria District both agree that admission to the gifted program must be free of racial discrimination. The ISBE and the Peoria District simply disagree as to the method to be employed in selecting gifted pupils. The sole issue is whether the ISBE has the authority to unilaterally determine that the

Peoria District was guilty of racial discrimination and withhold funds based upon that determination. The Illinois courts correctly held that the ISBE does not have the authority it now seeks. The decision of those courts should stand.

### A. ILLINOIS LAW DOES NOT AUTHORIZE THE WITHHOLDING OF FUNDS BY THE ISBE.

Although the ISBE refers to state law, it is not argued that the ISBE's authority to withhold funding is authorized by state law. The Illinois courts have determined that the ISBE had no authority under state law to withhold funding and this decision is conclusive. International Longshoremen's Association, AFL-CIO v. Davis, 106 S.Ct. 1904, 1910 (1986).

B. ILLINOIS LAW, NOT FEDERAL LAW, DETERMINES WHETHER THE ISBE MAY UNILATERALLY WITHHOLD STATE FUNDING BASED UPON UNPROVEN CHARGES OF RACIAL DISCRIMINATION.

The ISBE argues that an action not authorized by state law was nevertheless mandated by federal law. The record is replete, however, with admissions by the ISBE that its authority is derived from the Illinois Constitution and Illinois statute. For example, paragraph 3 of the Affidavit of former State Superintendent, Donald Gill provides:

> "The Illinois State Board of Education is a division within the executive branch of the government of the State of Illinois. The Illinois State Board of Education was created by Article X, Section 2 of the 1970 Illinois Constitution. The Illinois State Board of Education operates pursuant to the authority granted to it by the 1970 Illinois Constitution and under the authority of the School

Code, Ill. Rev. Stat., 1983, Ch. 122, Section 1-1, et seq." (R.C. 27)[2]

The record contains uncontradicted admissions that the ISBE's authority emanates from state law.

In McNeese v. Board of Education, 373 U.S. 668 (1963), this Court recognized that the issue of whether the Illinois State Superintendent had authority to withhold funding from a local district was a matter of state, not federal law. Under Illinois law, a local district is required to file with the State Superintendent, as a prerequisite for obtaining state aid, an affidavit that the district does not discriminate on the basis of race. Ill. Rev. Stat., Ch. 122, Section 18-12. The

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[2]For other admissions that the ISBE's authority is derived from state law see R.C. 38 and paragraph 4 of Answer at R.C. 101, "The Defendant, ISBE further states that its powers and duties are defined by the 1970 Constitution of the State of Illinois and by State statute."

McNeese Court questioned whether the State Superintendent would certify a district for state aid if he determined that the affidavit was false. The McNeese court stated:

> "Apparently no Illinois cases have held that the Superintendent has authority to withhold funds once he has received an affidavit from the district, even if he determines that the affidavit is false." 372 U.S. at 676 (1963).

The McNeese court specifically recognized that where there is a dispute between the State Superintendent and a local district as to whether a local district unlawfully discriminates, the issue of whether the State Superintendent had authority to withhold state funding was a matter of state, not federal law.

C. THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974 DOES NOT AUTHORIZE THE WITHHOLDING OF FUNDS BY THE ISBE.

Assuming federal law is considered, it does not grant the ISBE the authority it seeks. Nothing in the EEOA authorizes the action of the ISBE. The EEOA merely provides as an educational agency, in exercising authority granted it, must not exercise that authority in such a manner as to deny an individual an equal educational opportunity. The EEOA does not expand the authority of the state educational agency over what it perceives to be discrimination within a local district. As the Court of Appeals correctly noted in Board of Education v. Illinois State Board of Education, 810 F.2d 707, 713 (7th Cir. 1986), the authorities cited by the ISBE:

> "[m]erely stand for the proposition that a state board of education is a proper party defendant when the plaintiff alleges that its failure to fulfill its responsibilities under

state law has produced non-compliance with the EEOA."

The EEOA provides that educational agencies shall not deny individuals an "equal educational opportunity". The EEOA grants a right to sue to specific individuals. Section 1706 of the EEOA provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil suit in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this Chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

Nothing in the EEOA provides that a state level educational agency has the unlimited discretion to determine where and when discrimination exists and to withhold funding based upon that determination. The sole authority to enforce the EEOA is placed in the Attorney General of the

United States and those denied an equal educational opportunity.[3]

Had Congress wished to empower a state level educational agency with authority to withhold funding, it would have enacted a specific provision in the EEOA to that effect. Where Congress wished to allow an agency to withhold funding as a remedy for violation of a statute, Congress did so specifically. For example, 20 U.S.C. §1416 authorizes the Secretary of Education to withhold federal funds from a state or local educational agency where the agency has violated the Education for the Handicapped

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[3]The issue of whether the ISBE has standing or capacity to enforce the EEOA is addressed at length in Board of Education v. Illinois State Board of Education, 810 F.2d 707 (7th Cir. 1987), petition for cert. filed June 16, 1987, no. 86-2028. The Court of Appeals concluded the ISBE had neither standing nor capacity to sue to enforce the EEOA.

Act. (20 U.S.C. §1400 et seq.) The Secretary of Education may withhold the funds only "after reasonable notice and opportunity for hearing. . ." No comparable provision exists under the EEOA authorizing a state level educational agency to withhold funds. The absence of such a provision confirms that Congress did not intend that the ISBE have the authority it now seeks.[4]

The remedies sections of the EEOA nowhere authorize the action taken by the ISBE. 20 U.S.C. §1712 provides that only those remedies "essential to correct particular denials of equal educational

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[4]Another example of an express Congressional grant to withhold funding is provided in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6065. See also United States v. Mattson, 600 F.2d 1295, 1299 (9th Cir. 1979). Furthermore, the funds here in dispute are state funds, not federal funds. Congress might not be able to control their distribution had Congress sought to do so.

opportunity" shall be employed. 20 U.S.C. §1713 lists the alternative remedies. Such remedies may be employed only after a finding of liability. The ISBE, without a finding of liability, has employed the most drastic of remedies, a complete cutoff of funding. Congress obviously never intended to endow the ISBE with such authority.

Furthermore, in the cases cited by the Defendants, the authority granted the various state boards differed markedly from that granted the ISBE. For example, in two cases involving Ohio school boards; Reed v. Rhodes, 662 F.2d 1219 (6th Cir. 1981) and Penick v. Columbus Board of Education, 583 F.2d 787 (6th Cir. 1978), aff'd. 443 U.S. 449 (1979), the Sixth Circuit held that the Ohio State Board of Education had a duty under state law to withhold funding from local districts which discriminated. That the Sixth

Circuit looked to state law to determine the extent of the state board's authority is clear from the following:

> "The crucial consideration here concerns the powers and duties of the State Board. The parties agree that in 1956, as noted by the District Judge, the Attorney General interpreted this Ohio law as giving the State Board the power to withhold state funds from any school board which was operating an unlawfully segregated school system. The parties also appear to agree that this opinion (written by the present Chief Justice of the Ohio Supreme Court) is law which controls the State Board." Penick v. Columbus Board of Education, 583 F.2d 787, 817 (6th Cir. 1978).

In Illinois the local school districts are obligated and empowered to combat segregation while the State Board of Education has only limited authority to act in this area. See Aurora East Public School District v. Cronin, 92 Ill.2d 313, 442 N.E.2d 511 (1982).

Assuming, arguendo, that a state board of education is authorized to withhold funds from a local district,

there must first be a determination that the district improperly discriminates. None of the ISBE's authorities support its position that a state board may withhold funding from a local district based upon the state board's own finding of discrimination. On the contrary, the ISBE's authorities confirm that unilateral action may not be taken. In all of the cases cited, a state board was enjoined from providing aid to a local district only if there were a judicial or administrative determination that the district improperly discriminated. For example, in Penick v. Columbus Board of Education, 583 F.2d 787 (6th Cir. 1978), the Court referred to an Ohio Attorney General's opinion applying state law to determine whether a state board could withhold funds. The Attorney General's opinion, however, clearly provides that the withholding could be done only after an administrative

proceeding was conducted. The Attorney General's opinion provides in part:

> "It is the responsibility of the State Board of Education in the first instance to determine whether a particular school district, or the board of education of such district, 'has not conformed with the law' so as to require the withholding of state funds from such district. In making such a determination, the State Board of Education should observe the requirements of Administrative Procedure Act, Ch. 119, Rev. Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally." 583 F.2d at 817, footnote 9.

The EEOA provides no support for the ISBE's action. A state level educational agency is not permitted under the EEOA to withhold state funding. Assuming, arguendo, the existence of such authority, it could not be done without any form of notice or hearing.

D. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT AUTHORIZE THE WITHHOLDING OF FUNDS BY THE ISBE.

The ISBE fails to distinguish between whether it has a right to unilaterally withhold funding and whether a third party, such as a student, has a right to file suit to enjoin funding of a discriminatory program. Norwood v. D. L. Harrison, 413 U.S. 455 (1973) merely held that aggrieved parties could sue to enjoin the enforcement of a state's textbook lending program to private schools which discriminated upon the basis of race. No injunction would be issued, however, without a judicial determination that the private schools discriminated. Here the ISBE has unilaterally imposed the injunction without the required finding of discrimination. The trial court, in his remarks at the hearing on the motion for

summary judgment, recognized the state board's lack of authority by stating:

> "You (the ISBE) have the right at any time to file - to accuse the local district at any time if you follow your own procedures set forth in the law, you can make it a State Court issue as to whether or not there is discrimination in the gifted program. The question is whether or not you have a duty to pay before you prove the discrimination. You want the local district to be guilty without going to the trouble to prove up your case, and that's what this case is all about. You want to withhold funds without proving first that they discriminated and all they say is if you say we discriminate, prove it. Now that's where you are." (Tr. R. 66-67)

By withholding the funds the ISBE is, in effect, attempting to assert the rights of the students under the EEOA and under the Fourteenth Amendment. It has already been determined that the ISBE has no standing or capacity to sue on behalf of the students under either the EEOA or the Fourteenth Amendment. Board of Education v. Illinois State Board of Education, 810 F.2d 707 (7th Cir. 1987). Under the EEOA,

only those denied an "equal educational opportunity" and the Attorney General of the United States are authorized to file suit. 20 U.S.C. §1706. In limited situations a party may assert the civil rights of another. The Attorney General of the United States is often permitted to sue to enforce the rights of others. This may be done, however, only if authorized by statute. United States v. City of Philadelphia, 644 F.2d 187, 201 (3rd Cir. 1980); United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979).

No statutory authority authorizes the ISBE to sue to enforce the rights of the students under either the EEOA or the Fourteenth Amendment. The ISBE has nevertheless attempted to assert those rights by unilaterally withholding funding. It would be incongruous to hold that the ISBE had no standing to assert the EEOA or Fourteenth Amendment rights of the

students and, at the same time, hold that the ISBE could seek to enforce those rights by arbitrarily withholding state funds.

It must be stressed that there has never been a determination in any administrative or judicial proceeding that the Peoria District's gifted program discriminates on the basis of race. The ISBE asks this Court to assume that it does. The only support for this assumption is that the ISBE's determination that the program so discriminates. Based upon this determination, the ISBE refused to release state funds. The Appellate Court correctly noted that the ISBE:

> "[a]dopted their own arbitrary measure for dealing with perceived segregation." Board of Education v. Sanders, 150 Ill. App.3d 730, 502 N.E.2d at 736 (3rd Dist. 1986).

The trial and Appellate Courts were clearly correct that the ISBE had no

authority, under either state or federal law, to summarily withhold funding.

The implications of a ruling in the ISBE's favor are disturbing. Although the present case concerns funding only for a gifted program, the ISBE's position, if accepted, would apply to all educational programs of a local district. The Peoria District receives approximately 50% of its total revenue through the ISBE. If the ISBE could summarily withhold funding from a local district based upon unproven charges of segregation, the ISBE could close a district whenever it disagreed with the district's approach to desegregation. Such a result would be disastrous to public education as it would place each district at the mercy of the state board's unlimited discretion.

The present case exemplifies the problems encountered by a local district in addressing the arbitrary action of the

ISBE. It has taken the Peoria District three years to seek redress in the courts. Other local districts may not have the tenacity nor the financial ability to fight the ISBE. If the ISBE is permitted to withhold funding without the necessity of first obtaining a determination that discrimination exists, the ISBE could impose its will upon a local district. This would be done in cases, such as this one, where a good faith dispute exists as to whether unlawful discrimination exists. There is nothing in state or federal law which grants the ISBE the unlimited and powerful discretion that it now seeks. The Illinois courts correctly determined that the ISBE had exceeded its authority and there is no basis for disturbing their holding.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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